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Supreme Court, U.S.
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No._____

IN THE

Supreme Court of the United States

NICHOLAS DESTEFANO,

Petitioner,

v.

BROADWING COMMUNICATIONS, INC;
BROADWING TELECOMMICATIONS, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTION PRESENTED FOR REVIEW

Whether a mandatory arbitration provision in an employment agreement which specifically denies the arbitrator the authority to award punitive damages is enforceable as regards a claim by the employee of Title VII retaliatory discharge, a cause of action for which punitive damages are available under the statute.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Nicholas DeStefano - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Larry D. Knippa - Counsel for Petitioner
Broadwing Communications, Inc. - Respondent
Broadwing Telecommunications, Inc. - Respondent
Broadwing, Inc.(formerly Cincinnati Bell, Inc.) - Parent to Respondent
Nancy L. Patterson - Counsel for Respondent

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. The opinion of the United States District Court for the Southern District of Texas is non-published.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on August 20, 2002 and denied a petition for rehearing on August 20, 2002. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment.

a) Right of recovery (1) Civil Rights

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of the title, the complaining party may recover compensatory and punitive damages as

allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

18 U.S.C. § 1964(c). Civil Remedies.

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

STATEMENT OF THE CASE

Petitioner Nicholas D. Destefano seeks review of a decision of the United States Court of Appeals for the Fifth Circuit affirming the district court's enforcement of a mandatory arbitration provision which specifically denies the arbitrator the right to award punitive damages contained in an employment contract as regards Petitioner's claim of Title VII retaliatory discharge, a cause of action for which punitive damages are available under the statute.[1]

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[1] 42 U.S.C.A. §1981a (a)(1).

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit opinion in this case conflicts with opinions of this court, most notably in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), which confirmed the previous holdings of this court to the effect that while some statutory claims may be the subject of an enforceable arbitration agreement, "...[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.",[2] and "[S]o long as the prospective litigant effectively may vindicate {his or her} statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[3]

2. The Fifth Circuit opinion in this case conflicts with the opinion of the United States Court of Appeals for the Eleventh Circuit in *Paladino v. Avent Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), wherein the court refused to enforce a mandatory arbitration provision agreement which authorized the arbitrator "*to award damages for breach of contract only....*" *Id* at p. 1055, because that language "...is fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages." *Id* at p. 1060.

3. This is an important issue because it affects the rights

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[2]*Gilmer*, at p. 1652, quoting *Mitsubishi* at 637.

[3]*Gilmer*, at p. 1553, quoting *Mitsubishi* at 628.

of countless employees whose substantive rights written into the Civil Rights Act of 1991[4] by Congress[5] are threatened by mandatory arbitration agreements excluding punitive damages from the remedies available to the arbitrator entered into as a requirement of their employment in defiance of the mandate of Congress: "American workers should not be forced to choose between their jobs and their civil rights." [6]

4. This court has recently granted certiorari in a case with a similar issue, *Pacificare Health Systems v. Book, Jeffrey, et al,* 285 F.3d 971 (11th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3264 (2002)(No. 02-215). The precise issue in *Pacificare* is whether arbitration clauses that preclude punitive damages are enforceable in a RICO suit in which treble damages would otherwise be recoverable under the statute.[7] The Court of Appeals for the Eleventh Circuit refused to enforce the arbitration clause as regards the RICO claim, relying on its

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[4]42 U.S.C. § 2000e to 2000e-17 (1994).

[5] "SEC. 2. FINDINGS AND PURPOSES (a) Findings. Congress finds that....(2) existing protections and remedies under Federal law are not adequate to deter unlawful discrimination or to compensate victims of such discrimination.... (b) Purposes. The purposes of this Act are to ....(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination. 102 H.R. 40; Part I.

[6]*Id.* at 104.

[7]18 U.S.C. §1964(c).

previous holding in *Paladino,*[8] because "...the RICO claims in this case are based on a statutory remedy Congress has provided to any person injured as a result of illegal racketeering activities."[9] The issue in the instant case is in fact more clear cut than in *Pacificare* because here there is no question that punitive damages (instead of treble damages, as provided for by RICO) are provided for in the statute which is the basis of the claim which Petitioner is asserting. This court in *Gilmer*, rebutting the argument that the arbitration procedures in that case did not provide for equitable relief and class actions (but implicitly acknowledging that remedies are substantive rights in this context), pointed out that "...the...rules applicable here do not restrict the types of relief an arbitrator may award...."[10]

Petitioner's claim for relief in any event is more compelling than that of the Petitioner in *Pacificare* because employment contracts are generally entered into by employees as a condition of employment, and the waivers of statutory rights therein are not voluntary, while the waivers of statutory rights in commercial contracts, between commercial parties, such as in *Pacificare,* are ordinarily voluntary, resulting from negotiations. The Court is respectfully requested to decide this case and the *Pacificare* case as companion cases, or, at a minimum, to hold this petition until *Pacificare* is decided.

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[8] *Id.* at 973.

[9] *Id.* at 976.

[10] *Gilmer, supra,* at 33.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20238

NICHOLAS DESTEFANO,

Plaintiff-Counter Defendant - Appellant - Cross-Appellee

verses

BROADWING COMMUNICATIONS, INC.
BROADWING TELECOMMUNICATIONS, INC.

Defendants-Counter Claimants-Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(H-00-CV-2661)

Filed August 20, 2002

Before GARWOOD and DENNIS, Circuit Judges and LITTLE, District Judge.*

GARWOOD, Circuit Judge:**

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*Chief District Judge of the Western District of Louisiana, sitting by designation.

**Pursuant to 5th Cir. R.47.5 the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Plaintiff-Appellant-cross-appellee Nicholas DeStefano (DeStefano) appeals the district court order compelling arbitration.[1] Defendants-appellees-cross-appellants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. (collectively, Broadwing) appeal an order of sanctions. We affirm the district court in all respects.

Facts and Proceedings Below

In the fall of 1998, Austin-based IXC Communications and its subsidiary, Eclipse Telecommunications, Inc. (Collectively, Eclipse) began acquisition discussions with Coastal Telephone Company (Coastal), a Houston-based telephone services company. Eclipse is now Broadwing. Coastal was a privately held company, owned by Andrew Bursten and other trustee entities (collectively, the Burstens). On May 10, 1999, Eclipse acquired Coastal from the Burstens.

DeStefano was Coastal's sales manager and the supervisor of a large telemarketing force. On January 8, 1999, DeStefano entered into an employment agreement (the agreement) with Eclipse. The agreement provided that DeStefano would be employed by Eclipse for three year term, commencing on the date that Eclipse acquired Coastal. The agreement further provided that if DeStefano were terminated "without cause," prior to the expiration of the agreement he would be entitled to certain severance payments.

The agreement also included an arbitration clause, which provided as follows:

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[1]As we understand it, plaintiff spells his name "DeStefano;" apparently through error it appears on the docket sheet and in the record as "Destephano."

> "Binding Arbitration. The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas, in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitration shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration."

The Burstens had placed a sum of "bonus money" in escrow with Craig Cavalier, the Burstens' attorney. DeStefano was to receive the escrowed funds if he remained employed with Coastal for one year after Eclipse acquired Coastal. If not, the funds were to revert to the Burstens.

In the fall of 1999, twenty-seven charges of discrimination were filed with the Equal Employment Opportunity Commission (EEOC) by employees in the Houston office of Coastal (now Eclipse). Several of these charges alleged that DeStefano had instigated a sexually-charged work environment or that he had engaged in racial discrimination and harassment.

Eclipse terminated DeStefano's employment on November 4, 1999. In December 1999, the Burstens filed suit against Broadwing in state court (the Bursten litigation),

seeking declaratory judgment regarding certain issues related to the purchase agreement. After his termination, DeStefano made demand upon Cavalier for payment of the bonus money being held in escrow. DeStefano alleges that Broadwing sent a letter to Cavalier stating, "Since the termination was for case, no monies should be paid to Mr. DeStefano." DeStefano filed an interpleader suit in state court with the Burstens and Cavalier to obtain the bonus money. Broadwing was not a party to that suit.

On June 27, 2000, DeStefano filed the instant suit against Broadwing in Texas state court. DeStefano alleged breach of contract, retaliatory discharge under Title VII, and tortious interference with contract. On August 2, 2000, Broadwing removed the case to the United States District Court for the Southern District of Texas, Houston Division and filed a counterclaim alleging fraud, breach of fiduciary duty, and negligence by DeStefano in connection with Eclipse's purchase of Coastal. Broadwing filed a motion to compel in the agreement. On October 30, 2000, the district court entered an order granting Broadwing's motion and dismissing DeStefano's suit against Broadwing (the arbitration order). On November 3, 2000, Broadwing joined DeStefano in a third-party action in the Bursten litigation, asserting the same causes of action originally brought as counterclaims against DeStefano in the instant suit.

On November 8, 2000, DeStefano filed a motion for sanctions seeking monetary sanctions and seeking to have the order compelling arbitration rescinded and the case reinstated. The district court held a hearing on the sanctions motion on December 19, 2000. On January 31, 2001, the district court granted a monetary sanction against Broadwing in the amount of $5,160.00, but declined to rescind the arbitration order.

DeStefano appeals the district court's refusal to rescind the arbitration order. In the alternative, DeStefano argues that the district court erred in ordering arbitration of his Title VII claim, his tortious interference claim, and Broadwing's counterclaims. Broadwing cross-appeals the district court's imposition of the monetary sanctions.

Discussion

1. Sanctions and Waiver

DeStefano argues that the district court erred by declining to rescind the arbitration order as part of the sanction for its finding of civil contempt. He argues that Broadwing waived its right to arbitration by filing the third-party claims against DeStefano in the Bursten litigation. Broadwing, on its cross-appeal, argues that the district court erred in holding Broadwing in contempt and ordering monetary santions.

We review a district court's order holding a party in contempt for abuse of discretion. *Martin v. Trinity Industries, Inc.*, 959 F.2d 42, 46 (5th Cir. 1992). The underlying factual findings are reviewed for clear error and the underlying conclusions of law are reviewed *de novo*. *American Arilines, Inc. v. Allied Pilots Ass'n.*, 228 F.3d 574, 578 (5th Cir. 2000). "A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Martin*, 959 F.2d at 47. Upon a finding of contempt, the district court has broad discretion in assessing sanctions to protect the sanctity of its decrees and the legal process. See *American Airlines*, 228 F.3d at 585.

We first address Broadwing's appeal of the district

court's finding of contempt. The district court did not clearly err in finding that Broadwing was in contempt of the arbitration order. It is undisputed that Broadwing joined DeStefano to the state court action four days after the district court entered the arbitration order. Broadwing inexplicably argues that it could not have violated the arbitration order because the arbitration order "in no way requires any definate or specific action on the part of Broadwing." Broadwing's motion to compel arbitratin requested, *inter alia*, the following relief: "Defendants [Broadwing] be ordered to submit all counterclaims to binding arbitration in accordance with Plaintiff's Employment Agreement." The arbitration order granted Broadwing's motion in full. The district court's order thus compelled Broadwing to submit its counterclaims to arbitration and the district court did not err in determining that submitting the *same* counterclaims to another forum - the state court- was a failure to comply with the arbitration order.

As an explanation of its joining DeStefano to the Bursten litigation, Broadwing asserted that there were communication delays and statute of limitation concerns on Broadwing's side. Nancy Patterson, counsel for Broadwing in this federal suit, asserted that the district court's arbitration order, entered on October 30, 2000, did not arrive in her office until November 2, 2000. Patterson explained that she was out of the office that day and did not become aware of the arbitration order until the late afternoon of November 3, 2000. The Bursten litigation was being handled, in state court, by another law firm, which, according to Broadwing, was unaware of the arbitration order when DeStefano was joined to the Bursten litigation on November 3, 2000. As the district court noted, Broadwing still did not dismiss DeStefano from the state court proceedings even after Broadwing became aware of the arbitration order and DeStefano had still not been dismissed as of December 29, 2000, when the district court held its hearing

on the sanctions motion. Broadwing also cited statute of limitations concerns regarding their fraud claims against DeStefano, although the fraudulent conduct allegedly took place in the fall of 1998 and the statute of limitations for a fraud claim in Texas is four years. Tex. Civ. Prac. & Rem. Code § 16.004. The district court labeled Broadwing's arguments "wholly disingenuous." Broadwing argues that he district court did not make a specific finding of bad faith. Bur the district court held specifically that Broadwing "wilfully violated this Court's order." *Id.* at 5, and, at any rate, "good faith is irrelevant as a defense to a civil contempt order," *Waffenschmidt v. Mackay*, 763 F.2d 711, 726. The district court did not abuse its discretion by holding that Broadwing was in contempt of the court's arbitration order.

The district court did not err in setting the amount of monetary sanctions at $5,160.00. The parties agree that this sum covers the cost of attorneys' fees charged to DeStefano in connection with bringing the motion for sanctions. As far as concerns monetary relief, this is the full amount that DeStefano requested. Compensation for losses sustained by the complainant is a proper purpose for sanctions awarded in a civil contempt proceeding. *American Airlines*, 228 F.3d at 585.

DeStefano also requested that the arbitration order by rescinded and the court case be reinstated as a further sanction for Broadwing's contemptuous conduct. DeStefano, in his brief to this court, compares Broadwing's conduct to that of a party which has waived its contractural right to arbitration. When a district court has held that a party's conduct amounted to waiver of its right to arbitate, we review that finding *de novo*. *Walver v. J.C. Bradford & Co.* 938 F.2d 575, 577 (5th Cir. 1991). However, in the instant case, we are considering conduct after arbitration has been sought and been ordered by the court, and we are reviewing a district court's assessment of

sanctions in respect to that order. Thus, we will still apply abuse of discretion review to the district court's determination that rescinding the arbitration order was not an appropriate sanction in this case. One proper purpose of a civil contempt sanction is to coerce the contumacious party into compliance with the court's order. *American Airlines*, 228 F.3d at 585. Rescinding the arbitration order would have served a precisely opposite purpose. It was within the district court's discretion to decline to rescind the arbitration order. The district court did not abuse its discretion by denying DeStefano's request of this sanction.

2. The Confidentiality Provision

Having held that the district court did not abuse its discretion by declining to rescind the arbitration order as a sanction, we now turn to DeStefano's challenges to the substantive merits of the arbitration order. We review the grant of a motion to compel arbitration *de novo*. *Webb v. Investacorp*. 89 F.3d 252, 257 (5th Cir. 1996),

> "Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration and Prod. Co. v. Ramco Energy*, 139 F.3d 1061, 1964 (5th Cir. 1998).
>
> > "In adjudicating a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-step inquiry. The first step is to determine whether the parties agreed to arbitrate the dispute in question. The determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement. When

> deciding whether the parties agreed to arbitrate the dispute in question, courts generally...should apply ordinary state-law principles that govern the formation of contracts. In applying state law, however, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration cause itself must be resolved in favor of arbitration. The second step is to determine whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *Webb*, 89 F.3d at 257-58 (internal citations and quotation marks omitted).

DeStefano first argues that the arbitration clause's provision that "arbitration proceedings shall be conducted on a confidential basis" renders the arbitration procedure an inadequate alternative to the judicial forum. He contends that the confidentiality provision would preclude the parties from making a record of the arbitration proceedings. Thereby precluding judicial review.

DeStefano relies on the following language from *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655 (1991):

> "A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contents, in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards by in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued. In addition, the award decisions are made available to the public." (Internal

citations omitted).

Gilmer does not, as DeStefano contends, establish "minimal standards" of non-confidentiality. In the first place, the excerpted language does not constitute a holding of the court; it merely recounts a party's argument and the Court's explanation of why it was unavailing. In the second place, the *Gilmer* court went on the note that "Gilmer's concerns apply equally to settlements of ADEA claims, which...are clearly allowed." *Id.*

Additionally, DeStefano has not cited any evidence or authority to support his contention that the "confidential basis" provision would, in fact, preclude creation of a record.[2] Nor has he presented any evidence or authority to support his speculation that confidentiality would have a chilling effect on the production of witnesses. DeStefano's point of error related to the confidentiality provision is without merit.

3. The Waiver of Punitive Damages

DeStefano next argues that his Title VII claim cannot be subject to arbitration because the arbitration clause provides, "the parties expressly waive any claim or right to an award of punitive damages." DeStefano asserts that punitive damages

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[2]The arbitration clause further provides that the arbitration shall be conducted "in accordance with the commercial arbitration rules of the American Arbitration Association then existing." The current version of those rules has not been placed into the record, but we note that Broadwing has asserted, and DeStefano has not denied, that they require the creation of a record at the required of any party to the arbitration.

are a cause of action under Title VII and that, thus, they cannot be prospectively waived. *See Alexander v. Gardner-Denver Co.* 94 S. Ct. 1011, 1021-22 (1974). This argument is without merit.

If parties agree to arbitration, they will be held to it unless Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue. *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354-55 (1985). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.* at 3353. Doubts are resolved in favor of arbitrability. *Id.*

Punitive damages are not a cause of action under Title VII; they are a remedy that Title VII makes available in certain instances. *See Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 404 (5th Cir. 2000). "The potential unavailability of punitive damages is not a ground for denying effect to an otherwise valid agreement to arbitrate." *Morgan v. Smith Barney, Harris Upham & Co.* 729 F.2d 1163, 1168 n.7 (8th Cir. 1983); *see also, Great Western Mortgage Corp. v. Peacock*, 110 F. 3d 222, 232 (3d Cir. 1997) ("The availability of punitive damages is not relevant to the nature of the forum in which the complaint will be heard. Thus, availability of punitive damages cannot enter into a decision to compel arbitration.").

The arbitrator may consider the argument that the remedy of punitive damages may not be effectively waived for a Title VII claim. *See Shearson/American Express v. McMahon*, 107 S.Ct. 2332, 2340 (1987) ("[T]here is no reason to assume at the outset that arbitrators will not follow the law."); *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346, 3354 (1985) ("By agreeing to arbitrate a

statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."). The arbitrator's decision would be subject to judicial review. *See Shearson/American Express*, 107 S. Ct. at 2340 ("[S]uch review is sufficient to ensure that arbitrators comply with the requirements of the statute.") It may not even be necessary to reach this issue if it is determined that DeSteafno's Title VII claim is without merit (or, even if meritorious, is not such as would support punitive damages under Title VII.[3]

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[3]DeStefano's Title VII claim alleged in relevant part:

"RETALIATORY DISCHARGE

15. Plaintiff would show that Defendant has violated 42 U.S.C. § 2000e-3 by firing him for investigating allegations of unlawful discrimination and for attempting to assist and participate in an EEOC investigation of those allegations.

16. Charges were filed with the EEOC against Defendants which included allegations against Plaintiff. Plaintiff undertook his own investigation. Defendant, through attorneys, instructed Plaintiff to stop his investigation. The Defendant directed Plaintiff to meet with representatives of Defendant to discuss the matter. When Plaintiff notified Defendant that he intended to bring his attorney with him, the Defendant objected. Plaintiff appeared at the scheduled meeting with his attorney, but representatives of Defendant would not meet

We hold that the district court did not err in holding that DeStefano's Title VII claim was arbitrable.

4. DeStefano's Tortious Interference Claim

DeStefano's next argument is that his tortious interference claim was outside the scope of the arbitration clause because it arose after his employment with Broadwing had ended. This argument is without merit.

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with them. In furtherance of its scheme to make Plaintiff a scapegoat and to deprive him of the benefits of his employment agreement, Defendant sought to preclude Plaintiff from using his lawyer. Shortly thereafter, Plaintiff was fired by Defendant with no explanation other than it was "for cause."

17. Based upon subsequent developments, it become clear that a goal of the new ownership was to make Plaintiff a scapegoat for the EEOC complaints, to suppress the facts about any culpability of the new owners, and to use an indemnity agreement from the prior owners and/or funds and benefits owing to Plaintiff to fund the settlement with the charging parties rather than conduct a good faith investigation into the complaints, and to deprive Plaintiff of the benefits of his employment contract. Each of (1) Plaintiff's attempt to investigate and participate in the EEOC charges investigation and (2) his use of a lawyer was a precipitating cause of the firing of Plaintiff."

The arbitration clause encompassed "all claims or controversies in any way arising out of, relating to or associated with this Agreement." The conduct that DeStefano alleges as the basis for his tortious interference claim is associated with the employment agreement with Broadwing (formerly Eclipse). DeStefano alleges that Broadwing tortiously interfered with his relationship with the Burstens by instructing Cavalier not to pay DeStefano the bonus money that the Burstens had put in escrow. The crux of DeStefano's argument is that Broadwing informed Cavalier that DeStefano was terminated "for cause" even though, according to DeStefano, the reasons for DeStefano's termination did not fall within the definition of "cause" as contained in the employment agreement.

In light of the strong federal policy favoring arbitration, doubts about the scope of an arbitration clause are resolved in favor of arbitration. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 103 S.Ct. 927, 941 (1983). "[A]rbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Neal v. Hardee's Food Systems, Inc.*, 918 F.2d 34, 37 (5th Cir. 1990) (internal quotation marks omitted, citations omitted). An arbitration provision is generally interpreted according to ordinary state law principles governing the formation of contracts. *Webb*, 89 F.3d at 58; *see Metropolitan Prop. & Liab. Co. v. Bridewell*, 933 S.W. 2d 358, 361 (Tex. App.-Waco, 1996) (citing *Neal* in support of finding that a tortious interference claim was properly within the scope of an arbitration clause).

In an arbitration-related context, we recently mandated a board reading of the phrase "relates to" as used in a statute. *See Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002). *Beiser* involved interpretation of "relates to" as that phrase is used in

a statute conferring jurisdiction. *Id.* This is, of course, not equivalent to a holding that similar phrases in an arbitration agreement must be interpreted in that fashion. Still, in a general way, we find *Beiser* instructive as to the ordinary meaning of a broad formulation such as the one we interpret here–"in any way arising out of, relating to or associated with." This formulation is broad enough to encompass DeStefano's claim, which was based on his assertion that the terms of the agreement entitled him to receive the bonus money and severance benefits. Because we resolve any doubts in favor of arbitrability, we conclude that the district court did not err in holding that DeStefano's tortious interference claim was within the scope of the arbitration agreement.

5. Remaining Points of Error

On appeal, DeStefano raises two arguments that were not made in the district court: (1) He argues that Broadwing's counterclaims were not properly within the scope of the arbitration clause, and (2) he argues that he may not be compelled to arbitrate his tortious interference claim because it is against Texas public policy to permit waiver of punitive damages for such a claim. DeStefano concedes that these issues were not properly preserved for appeal. This court will not, as a general rule, consider issues not raised in the district court. *United States v. Parker*, 722 F.2d 179, 183 (5th Cir. 1983). We decline to do so here.[4]

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[4]We note that, at any rate, our analysis of the punitive damages issue as it related to the Title VII claim would dispose of the same argument as it relates to the tortious interference claim.

We further observe that DeStefano informs us that Broadwing has dismissed its state court suit (third party

Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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claim) against him.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-00-2661

NICHOLAS DESTEFANO,

Plaintiff

verses

BROADWING COMMUNICATIONS, INC. BROADWING TELECOMMUNICATIONS, INC.

Defendants

Filed October 30, 2000

ORDER GRANTING DEFENDANT'S PETITION TO COMPEL ARBITRATION AND DISMISSAL OF LITIGATION

HITTNER, District Judge

Pending before the Court is the Petition to Compel Arbitration and Request for Dismissal of Litigation (Instrument #4) filed by Defendants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. Having considered the motion, submissions on file, and applicable law, the Court determines that the petition should be granted.

Plaintiff Nicholas DeStefano ("DeStefano") filed the

instant suit in state court on June 27, 2000 alleging causes of action for breach of contract, tortious interference with contract, and retaliatory discharge in violation of 42 U.S.C. § 2000e-3 ("Title VII"), arising out of the termination of his employment with Defendants Broadwing Communications, Inc. and Broadwing Telecommunications, Inc. (collectively "Broadwing"). Broadwing removed the action to this Court on August 2, 2000. Broadwing now moves this Court to compel binding arbitration pursuant to an arbitration clause contained in DeStefano's employment contract and dismiss the instant suit. DeStefano opposes arbitration, claiming that the Federal Arbitration Act is inapplicable to DeStefano's employment contract, the arbitration clause is invalid because it does not encompass all of DeStefano's claims, the arbitration clause precludes full relief, and the arbitration clause would deprive DeStefano of his right to appeal.

"Arbitration is a matter of contract between the parties, and a court cannot compel a party to arbitrate a dispute unless the court determines the parties agreed to arbitrate the dispute in question." *Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1064 (5th Cir. 1998) (citations omitted). In order to determine whether the parties agreed to arbitrate their dispute, a court must engage in a two-step inquiry: "(1) whether a valid agreement to arbitrate between the party exists; and (2) whether the dispute in question falls within the scope of that arbitration agreement." *Id.* At 1065. If the court finds that the parties agreed to arbitrate and that the dispute in question falls within the scope of arbitration agreement, the court must then determine "whether any federal statute or policy renders the claims nonarbitrable." *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996).

There is a strong presumption in favor of arbitration. *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). The Federal Arbitration Act ("FAA") provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. It is undisputed that on January 8, 1999 the parties entered into a valid employment contract for a term of three years which contains an arbitration clause. Specifically, paragraph 5.12 of the Employment Agreement signed by DeStefano provides:

> The parties hereby consent to the resolution by binding arbitration of all claims or controversies in any way arising out of, relating to or associated with this Agreement. Any arbitration required by this Agreement shall be conducted before a single arbitrator in Austin, Texas in accordance with the commercial arbitration rules of the American Arbitration Association then existing, and any award, order or judgment pursuant to such arbitration may be enforced in any court of competent jurisdiction. The arbitrator shall apply rules of Texas law and the parties expressly waive any claim or right to an award of punitive damages. All such arbitration proceedings shall be conducted on a confidential basis. Notwithstanding the foregoing, either party may seek injunctive or other equitable relief in a court of law without proceeding through arbitration.

The Court therefore finds that the arbitration clause is valid, irrevocable and enforceable.

DeStefano argues that the FAA does not apply to his employment contract because Section 1 of the FAA provides "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. DeStefano describes his job as "supervising employees in obtaining customers for the telephone transmissions provided by BROADWING." In other words, DeStefano supervised telemarketers. DeStefano contends that "[t]he economic value of the transmission of electrical and electronic signals in interstate commerce is as significant as the movement of goods, people, mail, and packages." In support of this contention, DeStefano cites to *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (U.S. May 22, 2000) (No. 99-1379).

The focus of the arbitration exception confided in 9 U.S.C. § 1, however, is not the goods traveling in commerce; rather the focus is the nature of the job in question. Seamen and railroad employees are themselves physically engaged in the movement of goods in foreign or interstate commerce by the very nature of their employment. It is this distinct characteristic that qualifies these categories of workers for the arbitration exception. *See Rojas v. TK communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) (radio disc jockey not qualified for arbitration exception because exception only applies to employees "actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are"). "[T]he exclusionary language in § 1 is to be narrowly construed." *Id.* "Any broader interpretation of [§ 1] would undermine its significance." *Miller v. Public Storage Management, Inc.*, 121 F.3d 215, 217 (5th Cir. 1997). If radio disc jockeys, who are also engaged in "the transmission of ... signals in interstate commerce," do not come within the purview of the arbitration exception, neither do managers of

telemarketing businesses. The FAA clearly applies to DeStefano's employment contract.

The Court must next determined if DeStefano's claims fall within the scope of the arbitration clause. *Pennzoil*, 139 F.3d at 1064. DeStefano argues that the arbitration clause does not encompass his claim for tortious interference. However, the conduct DeStefano claims qualifies as tortious interference, to wit, Broadwing's denial of DeStefano's employment bonus, clearly falls within the purview of "claims or controversies in any way arising out of, relating to or associated with [his employment contract.]" DeStefano's claims are therefore within the scope of the arbitration clause.

The Court must next determine "whether any federal statute or policy renders the claims nonarbitrable." *Perez*, 960 F.2d at 538 (citations omitted). DeStefano argues that the relatively recent United States Supreme Court decision in *Wright v. Universal Maritime Service Corporation*, 525 U.S. 70 (1998), precludes employment discrimination claims from arbitration unless the arbitration clause specifically waives the federal forum by clear and unmistakable reference.

In *Wright*, however, the Supreme Court resolved a single issue: "whether [the] general arbitration clause in a collective-bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*" *Id.* at 72. The Court stated that such a waiver in a collective-bargaining agreement must be "explicitly stated" by "clear and unmistakable" language in order to be valid, irrevocable and enforceable. *Id.* at 80. The *Wright* case therefore appeared to call into question a prior Supreme Court case, *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991), where the Court held that

"statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Id.* at 26. According to *Gilmer*, "a claim brought under the Age Discrimination in Employment Act of 1967 (ADEA), ... could be subject to compulsory arbitration pursuant to an arbitration provision in a securities resignation form." *Wright*, 525 U.S. at 76.

Justice Scalia, writing for a unanimous court, distinguished *Wright* from *Gilmer*: "*Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees-and hence the 'clear and unmistakable' standard was not applicable." *Id.* at 80-81. *Gilmer* and its progeny are therefore controlling in the instant case and the arbitration clause at issue need not explicitly refer to the waiver by "clear and unmistakable language. Rather, "claims brought under the Title VII are ... within the boundaries of the FAA" and DeStefano is bound by the arbitration clause in his employment contract. *Miller*, 121 F.3d at 218; *Rojas*, 87 F.3d at 749.

DeStefano next argues that the arbitration clause is invalid because it precludes full Title VII relief. Specifically, DeStefano challenges the provision which waives recovery of punitive damages. DeStefano claims that punitive damages qualify as an indispensable element of a Title VII cause of action. Citing *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 51-52 (1974), DeStefano claims that "[a] party cannot be required to prospectively waive a cause of action under Title VII." Punitive damages, however, qualify as a remedy, not a cause of action. Hence, "[t]he potential unavailability of punitive damages is not a ground for denying effect to an otherwise valid agreement to arbitrate." *Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1168 n.7 (8th Cir. 1983), cited with approval in, Kinnebrew v. Gulf Ins. Co.*,

No. 3:94-CV-1517-R, 1994 WL 803508 at *2 n.10 (N.D. Tex. Nov. 28, 1994); *accord Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 232 (3rd Cir. 1997) (finding that contractual waiver of punitive damages is irrelevant to the issue of whether the plaintiff's claims should be arbitrated, even if such claims are recoverable under the statute). Indeed, "a contractual waiver of punitive damages is not a valid ground for refusing to compel arbitration." *Herrington v. Union Planters Bank, N.A.*, No. 2:98 CV231GR, 2000 WL 424232 (S.D. Miss. Jan 21, 2000) (page number unavailable).

Finally, DeStefano argues that the requirement of confidentiality in the arbitration clause deprives him of his right to appeal. Such a contention is without merit. Under the FAA, a party can seek judicial review of an arbitrator's decision. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *Williams v. Cigna Financial Advisors, Inc.*, 197 F.3d 752, 757 (5th Cir. 1999). Confidentiality only precludes the parties from publicizing the event in question. It is similar to the sealing of a record. Confidentiality, however, does not preclude the development of a record for appeal; nor does it preclude a party from judicial review. Indeed, such an effect would be contrary to federal law and would be preempted by the FAA. *See e.g.*, 9 U.S.C. § 10 (judicial review of arbitration award procured by corruption, fraud, or undue means or where arbitrator exceeded his powers).

When all claims before the court are subject to a valid, irrevocable and enforceable arbitration agreement, the proper remedy is to dismiss the complaint. *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674 678 (5th Cir. 1999); *Alfred v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992). Accordingly, the Court hereby

ORDERS that Defendants' Petition to Compel

Arbitration and Request for Dismissal of Litigation (Instrument #4 is GRANTED. The instant case is DISMISSED.

SIGNED, at Houston, Texas, on this the 30th day of October, 2000.